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Nos. 540 and 790.

In the Supreme Court of the United States,

OCTOBER TERM, 1923.

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, *Appellant,*

v.

E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees.*

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

Brief and Argument of Appellant.

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Law Brief Printing Co., Seattle

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E. V. KUYKENDALL, as Director of Public Works of Washington, HANCE H. CLELAND, as Supervisor of Public Utilities of Washington, and FRANK R. SPINNING, as Supervisor of Transportation of Washington, the persons constituting the Department of Public Works of the State of Washington, and JOHN H. DUNBAR, Attorney General of the State of Washington, *Appellees*.

APPEALS FROM AN ORDER DENYING AN INTERLOCUTORY INJUNCTION AND FROM A FINAL DECREE DISMISSING THE COMPLAINT.

Brief of Appellant.

Statement.

There are involved in this case two appeals: one, from an order made on April 30, 1923, by Honorable William B. Gilbert, Circuit Judge, and Honor-

able Edward E. Cushman and Honorable Jeremiah Neterer, District Judges, sitting as a statutory court under section 266 of the Judicial Code, which order denied an application made by The Pacific Telephone and Telegraph Company, appellant here, for an interlocutory injunction restraining the enforcement of a rate order made on March 31, 1923, by the Department of Public Works of Washington; the other, an appeal from a final decree signed by Judge Edward E. Cushman, District Judge, and entered on January 5, 1924, dismissing the complaint of the appellant company.

Inasmuch as the questions involved in these two appeals are substantially the same, it would seem that it would be but an added burden on the court to compel it to read a separate brief in each appeal. We shall, therefore, file but one brief.

A statement of the facts of the controversy follows:

The appellant (hereinafter referred to as the "company") is engaged in a general telephone and telegraph business in the State of Washington and elsewhere; the rates it charges for telephone service are subject to regulation by the State of Washington.

On August 8, 1919, the Public Service Commission of that State, now the Department of Public Works (hereinafter referred to as the "department") made an order prescribing the maximum rates to be charged by the company for its service, both exchange and toll, in Washington. These rates remained in effect until September 20, 1922, when the company filed a schedule advancing all its *exchange* rates in the State of Washington. The state law authorizes the department to suspend rate increases pending an investigation of their reasonableness. (Remington's Compiled Statutes, 1922, Sec. 10424.) The department issued an order suspending, for the full statutory period, the operation of these increased rates and directing the company to file a new toll rate schedule conforming in principle with the toll rates which had been effective prior to the war period.

On October 5, 1922, the company filed, as directed, the toll rate schedule and withdrew and cancelled the exchange rate schedule filed on September 20th except the rates and charges applicable to the cities of Seattle and Tacoma. In effect, what the company did on October 5th was to file a schedule increasing the exchange rates in Seattle and Tacoma and, under certain circumstances, toll rates through-

out the State, but leaving all other exchange rates the same as they had been at all times since August, 1919.

Thereafter hearings were held by the department at various times and places throughout the State.

On March 31, 1923, the department made an order—one member, the Supervisor of Public Utilities, dissenting—whereby the application of the company for increased rates in Seattle and Tacoma and for a new toll rate schedule was denied.

This order was preceded by certain findings of fact made by the department, the first one of which purported to determine the value of the used and useful property of the company in the State. (Transcript, p. 41.)

Parenthetically, it may be said that the statutes of the State of Washington, as construed by the Supreme Court of that State, provide that if the regulatory body of the State has at one time valued the property of a utility, the value of the property of such utility at any subsequent date shall be determined by adding to the original valuation the net additions and betterments since made to that property. (*State ex rel. Spokane Falls Gas Light Company v. Kuykendall*, 119 Wash. 107.) Inasmuch

as the company's property had been valued by the regulatory body in 1914, the department followed the course prescribed in the statute as construed by the Supreme Court. In short, it determined the value of the company's property in 1923 by adding to the original valuation made in 1914 the net additions and betterments made to that property since that date.

The state law authorizes a judicial review of a rate order in the state courts, provided that proceedings for such review are initiated within thirty days after service of the order. (Rem. Comp. Stat., 1922, Sec. 10428.)

The company did not sue out a writ of review within thirty days, nor has it ever brought any proceedings in the state court attacking the order of March 31, 1923.

The company did, however, on April 24, 1923, file a complaint in the United States District Court for the Western District of Washington, Southern Division, over which Judge Cushman presides, in which it alleged, *inter alia*, the filing of the rate schedule of August 8, 1919, the filing of the rate schedule of September 20, 1922, the suspension of this last named schedule by the department, the

filing of the schedule of October 5, 1922, and the making of the order by the department of March 31, 1923.

The company further alleged that the cost of its property in the State of Washington and the cost of its property in the cities of Seattle and Tacoma was substantially the rate base fixed by the department in its order of March 31, 1923; that these amounts were, for the State, the sum of $29,347,-254, for Seattle $17,023,372, and for Tacoma $2,-888,021; that the fair value of its property in the State was $35,616,896, in Seattle $20,852,062, and in Tacoma $3,457,290; that under the schedule of rates in effect during the year 1922, and which schedule was continued in effect by the order of March 31, 1923, the company had earned in 1922 upon the *cost* of its property in the State 3.17 per cent, in Seattle .19 per cent, and in Tacoma .89 per cent; that upon the fair value of its property under such schedule it had earned in 1922 in the State 2.58 per cent, in Seattle .15 per cent, and in Tacoma .75 per cent; that if the order of March 31, 1923, was enforced it would be prevented from earning any return in excess of 2.11 per cent per annum upon the fair value of its property in the State, .54 per cent *loss* per annum upon the fair value of its

property in Seattle, and .56 per cent per annum upon the fair value of its property in Tacoma; that had the rates found by the Supervisor of Public Utilities in his dissenting opinion of March 31, 1923, to be just, fair and reasonable rates, been in effect throughout the year 1923, the return to the company on the fair value of its property would have been, for the State 5.09 per cent, for Seattle 2.81 per cent, and for Tacoma 3.96 per cent; that for the same period, the return upon the cost of its property would have been, for the State, 6.15 per cent, for Seattle 3.42 per cent, and for Tacoma 4.73 per cent; and that such rates were *less* than just and reasonable rates, but that the company proposed to establish and put into effect such rates pending the final decree in the case.

It prayed, therefore, that the rates prescribed in the order of March 31, 1923, be decreed to be confiscatory, in violation of the Constitution of the United States, and that it be permitted to put in force the schedule of rates found by the dissenting member of the department to be just and reasonable until such time as just and reasonable rates and charges were established according to law. (Transcript, pp. 1 to 10.)

On the same date that the complaint was filed, the company applied to Judge Cushman for a temporary restraining order, which order was granted on that date. A copy of this order appears on page 92 of the printed transcript in case numbered 540 and on the same page in case numbered 790. We may here say that the printed transcript in case numbered 790 is identical with the printed transcript in case numbered 540 for the first 164 pages.

Subpoenas were issued on the same date the restraining order was granted, and served on the defendants named in the complaint, appellees here, on April 25, 1923. Jurisdiction of the United States District Court over the cause had, therefore, fully vested on April 25, 1923.

On April 27, 1923, the City of Seattle sued out a writ of review in the Superior Court of the State of Washington for Thurston County, claiming that the rates fixed by the department's order of March 31, 1923, for Seattle were excessive. (Transcript, p. 135.) The rates for toll service throughout the State and the rates for Tacoma fixed by the department's order of March 31, 1923, are not attacked by this proceeding of the City of Seattle.

It will at once occur to this court that the proceeding brought by the City of Seattle is not such a proceeding as is described in the amendment of March 4, 1913 (37 Stat. 1013), to section 266 of the Judicial Code, the effect of which would be to stay all proceedings in the suit brought by the company in the United States District Court, for this proceeding brought by the City of Seattle was *not* brought to *enforce* the order, but to *attack* it; nor was the order of March 31, 1923, stayed by any order in the Thurston County case.

The application for an interlocutory injunction came on to be heard before Judge Gilbert, Judge Cushman and Judge Neterer on April 30, 1923. At that time the department and the Attorney General filed three motions, one to dismiss the complaint, another to dissolve the restraining order, and the third to stay all proceedings in the suit instituted by the company in the United States District Court on April 24, 1923. (Transcript, pp. 125, 126, 134.)

After argument was concluded on April 30th, the statutory court entered an order dissolving the restraining order, denying the interlocutory injunction, and stated that an opinion would be filed later. (Transcript, p. 149.)

The opinion was filed on May 23, 1923. It states, in substance, that the proceeding instituted by the City of Seattle in the Thurston County court was not one brought to enforce the order of the department on March 31st, and therefore does not fall within the amendment to section 266 of the Judicial Code; that there was no need for the company to apply to the department for a rehearing of the rate order before it brought the suit in the United States District Court; that under the statutes of the State of Washington the courts of that State in reviewing a *rate* order, act in a *judicial* capacity because the state courts are given no power by the section of the statute relating to the review of a rate order to make their own findings or fix rates, and, consequently, so far as the rate order of March 31, 1923, was concerned, the suit in the United States District Court was not prematurely brought.

It states further, however, that the complaint filed in the United States District Court shows that there is a controversy as to the value of the property of the company; that under the statutes of the State of Washington (Rem. Comp. Stat., 1922, Sec. 10441) the Superior Courts and Supreme Court of that State "have *legislative* authority in determining the rate base superior to that of the depart-

ment," and that " 'considerations of comity and convenience' require the court to hold that until plaintiffs have exhausted their right to relief in the Superior and Supreme Courts—relief, in part at least, legislative in character, these causes must be stayed." (Transcript, p. 161.)

The statutory court further held that if the company initiated a review proceeding in the state court and applied in that proceeding for a stay of the enforcement of the order of March 31st, and also applied for a stay in the proceeding brought by the City of Seattle in the Thurston County court, and such applications for stay were denied by the Superior Courts of the State of Washington and such denials affirmed by the state Supreme Court, then the company might renew its application in the United States Court for an interlocutory injunction. (Transcript, p. 162.)

It is at once apparent that the statutory court considered that the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, was controlling.

An appeal was taken by the company from the order of the statutory court denying the interlocutory injunction, and the same was docketed in this court as cause No. 540.

On July 5, 1923, the company filed a motion in the United States District Court for the Western District of Washington, Southern Division, for an order requiring the defendants named in the complaint, appellees here, to file forthwith, an answer to the complaint, or in default thereof that a decree *pro confesso* be entered against said defendants.

As hereinbefore stated, the appellees had on April 30, 1923, filed, among other motions, a motion to dismiss the complaint, on the ground that there was a want of equity in the complaint. No argument had ever been had up to that time on the motion to dismiss.

On July 9, 1923, after argument, the District Judge declined to consider or pass upon the motion to dismiss the complaint, and denied the motion to require the appellees to answer, specifically basing his ruling in both instances upon the reasons set forth in the opinion rendered by the statutory court and filed on May 23, 1923.

On August 2, 1923, the company sued out in the Circuit Court of Appeals for the Ninth Circuit a rule to show cause why the District Court should not proceed. The case was heard by the Circuit Court of Appeals on September 18, 1923. On

October 7, 1923, the case was decided by the Circuit Court of Appeals in favor of the company, and a writ of mandamus was issued by that court commanding the District Court to proceed forthwith. (The opinion of the Circuit Court is reported in 292 Federal Reporter at page 930.)

The District Court, upon receipt of the mandate, vacated the order of July 9, 1923, and assigned October 29, 1923, as the date for argument on the motion to dismiss the complaint.

For various reasons not necessary now to mention, argument on the motion to dismiss was not had until December 31, 1923. On that date, after argument, the District Judge, Honorable Edward E. Cushman, granted the motion to dismiss the complaint of the company on the ground, primarily, that the suit had been prematurely brought by reason of the failure of the company to exhaust its alleged right to relief in the Superior Courts and Supreme Court of the State of Washington.

A formal decree dismissing the complaint was signed by the District Judge and filed on January 5, 1924. Thereupon, an appeal was taken from that decree to this court and is docketed herein as cause No. 790.

Assignment of Errors.

There is some slight difference between the Assignment of Errors in case No. 540 and case No. 790, but the difference arises solely from the character of the action complained of. For convenience sake, however, all Assignment of Errors in both appeals may be summarized and grouped as follows:

I.

The judicial stage is reached whenever judicial intervention is necessary to obtain relief from confiscatory rates ordered by a regulatory body.

II.

Legislative power cannot constitutionally be vested in Washington state courts.

III.

The Washington state law expressly forbids a stay.

IV.

Wholly apart from constitutional questions, the legislative process in this case was complete prior

to the filing of the complaint in the United States Court.

V.

The complaint states a cause of action for injunctive relief.

Argument.

It is apparent that both the statutory court and the District Judge thought that this case was controlled by the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

It was held in that case that where the reduced rates had not taken effect and probably would not take effect until the Supreme Court of Appeals of Virginia could, on appeal from the order of the Virginia Commission, perform the legislative function, constitutionally vested in the court, of finally fixing rates "considerations of comity and convenience" required that the railroad companies should delay their application for relief to the United States courts until the legislative issues raised by the appeals were denied, or it became reasonably certain in some other way, as by dismissal of the appeals, that the prescribed rates would be put into operation.

In that case legislative power has been imposed by the Constitution of Virginia upon its state courts, and the order of the regulatory body was therefore not the final legislative act.

Again, in that case the property of the railroad company had not, at the time of the application to the United States court, been confiscated and its property would be confiscated only in the event that the reduced rates were finally put into operation. That case is not applicable to the facts in the case at bar for several reasons:

1. The judicial stage is reached whenever judicial intervention is necessary to obtain relief from confiscatory rates ordered by a regulatory body.

2. Legislative power cannot constitutionally be vested in the Washington state courts.

3. The Washington state law expressly forbids a stay.

4. Wholly apart from constitutional questions, the legislative process in this case was complete prior to the filing of the complaint in the United States court.

I.

THE JUDICIAL STAGE IS REACHED WHENEVER JUDICIAL INTERVENTION IS NECESSARY TO OBTAIN RELIEF FROM CONFISCATORY RATES ORDERED BY A REGULATORY BODY.

The *Prentis* case is based upon "considerations of comity and convenience." In that case there had been no present invasion upon the rights of the railroad companies. They had not lost a single dollar. In the case at bar, however, the company is now and has been suffering daily from confiscation under the rate to which it is now limited. Its constitutional rights have been invaded. "Rules of comity and convenience must give way to constitutional rights."

The case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is directly in point. The Constitution of Oklahoma, like that of Virginia, confers legislative power upon the courts. In that case there had been no final decision of the Supreme Court of that State which was the last legislative tribunal. This court held, however, that inasmuch as the utility was suffering daily from confiscation under the rate to which it was limited, the

statutory court should have heard the application for an interlocutory injunction upon the merits.

In support of this conclusion, this court cites *Love v. Atchison, Topeka & Santa Fe Ry. Co.*, 185 Fed. 321, which states very clearly the reasons supporting court intervention pending the completion of the legislative process. We quote from the *Love* case, page 327:

"The legislative function in rate-making looks to the future and determines what future rates shall be. But when rates, either tentative or final have been put and are maintained in actual operation under penalty of severe fines, the question whether or not their effect is to take the property of the railroad companies affected thereby without just compensation is a judicial one, conditioned by past or present facts, and the national courts cannot be deprived of jurisdiction of it by the fact that the process of making the tentative rates is yet incomplete. It is as clear a violation of the Constitution, and one as promptly remediable in the national courts, to take the property of a railroad company without just compensation by the enforced operation of tentative rates during the process of their making as by the operation of final rates after that process is complete. Railroad companies that have been, are, or will be deprived of parts of their property devoted to the public use of transportation without just compensation during the continuance of the rate-making process by provisions of a state Constitution or of a state law, or by orders of a

state commission, prescribing tentative rates and putting them in effect during the rate-making process under severe penalties, may maintain suits for and obtain relief by injunction during the continuance of the rate-making process to the same extent that they may after the process is completed. These suits were not prematurely brought."

The same question was again before this court in *Prendergast v. New York Telephone Co.*, 262 U. S. 43, where this court followed and cited with approval *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, and *Love v. Atchison, Topeka & Santa Fe Ry. C.*, 185 Fed. 321, and concluded as follows: "Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined *pending the continuance and completion of the rate making process.*" (Italics ours.)

We say again that there has been a present invasion of our constitutional rights, and that judicial intervention is necessary to obtain relief from such invasion. If judicial intervention is necessary to obtain relief, it is clear that the judicial stage is reached.

Where the utility is daily suffering confiscation it is not necessary that the legislative process be complete before a resort is had to the United States Courts.

The only distinction ever sought to be drawn by appellees between the case at bar and the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is that in the Oklahoma case an application was made to the Supreme Court of that State for a stay and such application denied. In fact, however, no such distinction exists, because, as we shall show later, the law of the State of Washington expressly forbids the courts of that State from granting a stay.

II.

LEGISLATIVE POWER CANNOT CONSTITUTIONALLY BE VESTED IN WASHINGTON STATE COURTS.

The statutory court in denying the interlocutory injunction and the District Court in dismissing the complaint did not hold that the state courts possessed legislative power in respect to the rate order of the department. The statutory court and the District Court based their action solely upon the fact that section 10441 of Rem. Comp. Stat., 1922, of Washington, imposes upon the state courts of Washington the *legislative* authority of determining the value of the property of public service companies operating in that state.

An examination of the Washington law is necessary. In the case of an order affecting *rates*, the statute provides for a *judicial* review of such order by the state courts. This is clear from the provisions of section 10428 of Rem. Comp. Stat. of Washington, 1922. That section provides that any complainant or public service company affected by a rate order may, within thirty days after the making of the order, sue out a writ of review in one of the superior courts of the State of Washington. It further provides for a hearing before such court and that "upon such hearing the superior court shall render judgment either affirming or setting aside the order of the commission under review."

Similar provisions are found in the regulatory acts of a majority of the states.

But an entirely different situation is presented when the provisions of the Washington statute relative to the determination of value are considered.

Section 10441 of Rem. Comp. Stat., 1922, directs the regulatory body to ascertain, as early as practicable, the value of every public service company subject to its jurisdiction. It then provides for a hearing at which the utility affected may be heard,

and for the making of findings of fact by the regulatory body, which findings shall cover in detail all matters which the legislature deemed material to the determination of value.

This valuation proceeding is independent of rate controversies.

The statute further provides that the utility, and the utility alone, may institute a suit in one of the superior courts of the State of Washington for the purpose of having the findings of the regulatory body reviewed, and that in case the Superior Court to which appeal has been made

"finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful, or not supported by the evidence [the court] *shall make new and correct findings* to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received."

The statute also provides that an appeal may be taken from the judgment of the Superior Court to the Supreme Court, and that

"in case the supreme court finds any findings so

sought to be reviewed unjust, incorrect, unlawful, or unreasonable, or not supported by the evidence, *it shall either make and render proper findings* or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received."

Further,

"the findings . . . . . shall be admissible in evidence in any action, proceeding or hearing . . . . . and such findings, when so introduced, shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing . . . . ."

(For the convenience of the court we set out in full sections 10428 and 10441 as an appendix to this brief.)

Now we concede that the review provided for in section 10441 is not a judicial review, and that this section is similar to paragraphs 6, 7 and 8 and the first sentence of paragraph 64 of the Public Utilities Act of the District of Columbia, and which sections of said Act were considered by this court in the case of *Keller, et al, v. Potomac Electric Power Company, et al*, 261 U. S. 428.

It was held in that case, among other things, that the act of Congress attempted to confer upon this court the power to make the order the Commission should have made, and that such power was legislative power.

In the case at bar it is clear that the legislature of the State of Washington has attempted to confer a like power upon the courts of that State.

But the question here for solution is, Could the legislature, under the Constitution of that State, vest legislative power in the courts?

There is no provision in the Constitution of the State of Washington similar or analogous to the provision in the Constitution of Virginia discussed in *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210.

On the contrary, the provisions of the Constitution of the State of Washington relative to the vesting of powers are almost identical with the provisions in that regard of the Constitution of the United States.

In the absence, therefore, of some declaration to the contrary by the Supreme Court of the State of Washington, the decision of this court in the case of *Keller, et al, v. Potomac Electric Power Company, et al*, 261 U. S. 428, is controlling.

The doctrine therein announced is supported by an almost unbroken line of authority starting at the very beginning of this Republic and extending to the present date. In confirmation of this statement, we cite the following cases:

Hayburn's Case, 2 Dall. 409, and note at p. 410;

The Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930;

Kilbourn v. Thompson, 103 U. S. 168, 190;

United States v. Ferreira, 13 How. 40, and note;

Helena Water Co. v. City of Helena, 277 Fed. 66, 68;

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In re Sims, 54 Kan. 1;

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Case of Supervisors of Election, 114 Mass. 247;

Butler v. State, 97 Ind. 373;

Ex parte Griffiths, 118 Ind. 83;

United Fuel Gas Co. v. Public Service Commission, 73 W. Va. 571;

In re County Commissioners, 22 Okla. 435;

Board of Supervisors v. Todd, 97 Md. 247;

Taylor & Co. v. Place, 4 R. I. 324, 345, 357, 358;

Bates v. Kimball, 2 D. Chip. (Vt.) 77;

Kimball v. Grantsville City, 19 Utah 368;

Houseman v. Kent, 58 Mich. 364;

Merrill v. Sherburne, 1 N. H. 199, 204.

But we are not without clear decisions of the Supreme Court of the State of Washington holding that the legislature cannot impose legislative functions upon the courts of that State.

In *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 110, the court said:

"We hold that a *judicial* court *cannot* exercise legislative functions and that the *legislature cannot impose such power upon it.*"

In *State ex rel. Seattle v. Public Service Commission*, 76 Wash. 492, 500, the court said:

"Manifestly, it is wholly impractical and *beyond the proper sphere* of the courts to assume to control in any degree this purely nonjudicial duty of the commission. Any attempt on the part of the courts

to do so would, it seems clear to us, be to enter the field of executive and administrative duties. *Such would be clearly subversive of our theory of government.*" (Italics ours.)

We quote from *In re Bruen*, 102 Wash. 472, at page 478:

"These functions being essentially judicial and inherent in the courts, we are of the opinion that the legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated legislative powers. Such a system is not warranted under our constitutional form of government. The legislative, executive, and judicial functions have been carefully *separated* and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts." (Italics ours.)

See also:

Spokane v. Spokane and Inland Empire R. Co., 75 Wash. 651; 659;

Selde v. Lincoln County, 25 Wash. 198, 206;

Pacific Tel. & Tel. Co. v. Cushman, District Judge, 292 Fed. 930.

Since, as we have shown, legislative power cannot constitutionally be conferred upon the state courts of Washington, it is obvious that the legislative process terminated upon the making of the rate order of March 31, 1923.

III.

THE WASHINGTON STATE LAW FORBIDS A STAY.

It will undoubtedly be claimed that the case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is not applicable because of the failure of the company to seek a stay of the rate order in the Washington state courts. But that case is not so distinguishable. As already stated, it would be useless for the company to ask either the Superior Court of Thurston County or the Supreme Court of the State of Washington to stay the enforcement of the order of March 31, 1923, because the state courts are expressly prohibited by statute from staying the enforcement of that order.

Section 10424, Rem. Comp. Stat., 1922, relating to the filing of tariffs increasing rates and providing for a hearing on such proposed increase and

the suspension of the schedule pending the hearing, declares that:

"If the commission shall at the conclusion of the hearing refuse to permit such increase, either in whole or in part, no supersedeas shall be granted in any action or proceeding brought to review the order of the commission pending the final determination of such action by the superior court, or, if appealed to the supreme court, by such supreme court."

It is not open to question that this provision is plain, direct, positive and unambiguous.

Moreover, the granting of a stay is expressly prohibited by another provision of the Washington law. The rates approved by the department in its order of March 31, 1923, had been put in effect originally on August 1, 1919. The rates, therefore, on March 31, 1923, had been in effect *for more than one year.* On October 5, 1922, the company filed a schedule advancing the rates for telephone service in the cities of Seattle and Tacoma, and toll rates throughout the State. Section 10429, Rem. Comp. Stat., 1922, provides that:

"when any rate has been in force for any length of time exceeding one year, and such rate is advanced by the public service company, and the order of the commission reinstates such prior rate, in whole or in part, no supersedeas shall be allowed

in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court, by such supreme court."

It is manifest, therefore, that even though the company had instituted review proceedings in the Superior Court of Thurston County and had applied in that proceeding and also in the proceeding brought by the City of Seattle in the Thurston County court for a stay, neither that court nor the state Supreme Court could have granted any relief to the company until after the final decision of the case upon its merits by the Supreme Court.

Since any application to the state court for a stay would not only have been futile, but also one which the company had not the legal right to make, the company should not have been required to make it as a condition precedent to its resort to the United States Court.

The case of *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290, is, therefore, not distinguishable from the case at bar, and the following language of the Circuit Court of Appeals in *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, is apposite:

"Again, if the petitioner was denied a supersedeas by the state or by the state courts, the rule

announced in the Oklahoma Gas Co. Case applies, and in this connection it is immaterial whether the supersedeas was denied by the court or by the supreme legislative authority of the state."

As indicated in the opinion of the Circuit Court of Appeals in the case of *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, appellees have heretofore sought to escape the plain provisions of sections 10424 and 10429, Rem. Comp. Stat., 1922, by asserting (a) that such provisions are unconstitutional, and (b) that the state courts of Washington have inherent power to grant a stay. These contentions merit but little consideration.

No reason has ever been assigned why the statutes in question should be held to be unconstitutional. We can conceive of no reason why the statutes should be held invalid. Moreover, how can the question as to whether the statutes are valid or not arise? We believe that the statutes absolutely deprive the state courts of the power to grant a stay, and that the statutes are valid. On what theory then can we ask the state courts for a stay? Are we to go into a court of justice and ask the court to grant to us a relief which we firmly believe the court has not the power to give?

With reference to the argument that the state courts have inherent power to grant a stay despite the express and positive provisions of the statutes to the contrary, we say that the state courts acting in a *legislative* capacity have no such power. Hence, if the state courts do have inherent power to grant such a stay, they have it wholly in the exercise of their general judicial power. But we may not safely apply to the state courts acting in a purely judicial capacity for relief. (*Detroit & Mackinac Ry. Co. v. Michigan R. R. Commission*, 235 U. S. 402.)

Moreover, appellees cannot assert that the state courts could in this case act in a judicial capacity, for the entire basis of their defense is that the court is acting in a legislative capacity.

Again the language of the Circuit Court of Appeals in *Pacific Tel. & Tel. Co. v. Cushman, District Judge*, 292 Fed. 930, 934, is pertinent.

"But it has been mildly suggested that this provision of the law may be declared unconstitutional by the Supreme Court of the state, or that the courts of the state might grant a supersedeas, notwithstanding the prohibition contained in the statute. We are not permitted to indulge in any such speculation where important constitutional rights are involved. No ground of unconstitutionality has

been suggested; the presumption is to the contrary, and in this case we think the presumption accords with the fact. In the exercise of appellate jurisdiction conferred by the Constitution, it may be that the Supreme Court of the state has inherent power to grant a supersedeas to the end that its appellate jurisdiction may not be defeated; but however that may be, where, as here, the appeal is wholly statutory, jurisdiction may be conferred or withheld at the pleasure of the Legislature."

IV.

WHOLLY APART FROM CONSTITUTIONAL QUESTIONS, THE LEGISLATIVE PROCESS IN THIS CASE WAS COMPLETE PRIOR TO THE FILING OF THE COMPLAINT IN THE UNITED STATES COURT.

(1) As already stated, section 10441 Rem. Comp. Stat., 1922, provides for a general investigation and the making of findings concerning matters material to the determination of the valuation of a public utility. These findings may be reviewed and corrected by the courts, and as made or corrected "when properly certified under the seal of the commission" are "admissible in evidence in any action, proceeding or hearing," and are "conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing."

The findings relative to the value of the company's property which were introduced in evidence in the hearing of 1923 before the department, were made in 1914. These findings have not been reviewed.

If we assume, for the sake of the argument only, (a) that legislative power may be imposed upon courts in the State of Washington, (b) that the Washington state courts may determine value in accordance with the principles enunciated by this court (which, as a matter of fact, they may not do), and (c) that the valuation findings are now subject to review in the state courts, nevertheless a review of such findings at this time would not affect the rate order of March 31, 1923, which became final, so far as resort to the state courts was concerned, by the failure to review that order within the thirty day period provided by the state statute.

The rule that the rate making process may become final so as to permit resort to the United States courts *by the failure of the utility to invoke the action of the final state legislative authority* under the provisions of the state law, is recognized in the *Prentis* case. The court there declined to proceed until the final action of the legislative

authority of the State, namely, the Supreme Court of Appeals of Virginia. Attention was directed, however, to the provisions of the Virginia law requiring appeals to be taken within six months from the date of the order of the primary regulatory body, and to the fact that it might be found in that case that it was too late to appeal. The court, in consequence, declined to dismiss the bills, holding that they should be retained to await the result of the appeals, "if the companies see fit to take them," and that "if the appeals are dismissed as brought too late, the companies will be entitled to decrees."

In the case now before the court, the company did not within thirty days sue out, nor has it ever sued out a writ to review the order of March 31, 1923. The time within which such proceedings might have been begun expired on April 30, 1923, the day on which the application for an interlocutory injunction was argued. It is manifest that under the provisions of the state law, the company cannot now institute any proceeding in the state court by which it might obtain relief.

Considering, therefore, for the moment that in respect to valuation findings the state courts of Washington do possess legislative power, nevertheless the proceedings in this case have reached the

judicial stage within the rule announced in the *Prentis* case.

(2) One of the controversies between the company and the department is whether the value of the company's property is to be determined in accordance with the principles enunciated by this court or in accordance with the statute of the State of Washington as construed by the Supreme Court of that State, which statute so construed is in conflict with these principles. The statute, section 10441, Rem. Comp. Stat., 1922, as construed by the Supreme Court of Washington in the case of *State ex rel. Spokane Falls Gas Light Co. v. Kuykendall*, 119 Wash. 107, provides that when the regulatory body has once valued the property of a public utility, the value of any such property at any subsequent date must be determined by adding to the original valuation the net additions and betterments made to that property since the original valuation. This was the method pursued by the department in this case, as shown by the following excerpt from Finding No. 1 of the findings made by the majority members of the department and an identical finding made by the dissenting member of the department in his opinion:

"As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring

up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922." (Transcript, pp. 41, 58.)

But this court has decided time and time again that the value of the property of a public utility is to be determined as of the time when the inquiry regarding rates is made.

We need cite on this proposition only the two recent cases of *State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U. S. 276, and *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U. S. 679.

Section 10441, therefore, as construed by the Supreme Court of Washington, is in contravention of the due process clause of the United States Constitution. It follows that the judicial stage of the proceeding was reached when the order of the department was made, and that resort might then be had to the United States District Court.

(3) Again, assuming for the sake of argument only, that legislative power may be imposed upon the state courts of Washington and that the courts of that State may apply the rule prescribed by this court for determining value, nevertheless in decid-

ing whether in any particular controversy the court is acting judicially or non-judicially, the test to be applied is that "The nature of the final act determines the nature of the previous inquiry." (*Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, 227.)

If a regulatory body is empowered to determine value in the exercise and aid of its general authority, independent of a rate proceeding, then the action of a reviewing court, having the power to substitute a different value, is legislative. But if a court is reviewing the valuation in a rate case in order to determine whether the rates prescribed by the regulatory body are confiscatory or not, the action of the reviewing court is judicial, unless it has authority to substitute other rates for those found by the regulatory body which authority the courts of the State of Washington clearly do not have.

In the case at bar, the order of March 31st establishes certain rates. If that order was reviewed in the state courts, those courts could not fix a new rate. The sole act which that court could perform would necessarily be judicial. The judicial stage, therefore, having been reached resort might be had to the United States court.

V.

THE COMPLAINT STATES A CAUSE OF ACTION FOR INJUNCTIVE RELIEF.

Some contention was made at the time of the argument on the motion to dismiss that the complaint in this case did not state a cause of action because its averments were averments of conclusions of law rather than averments of fact. A comparison of the allegations of this complaint with the allegations contained in the complaint in the case of *Prendergast v. New York Telephone Co.*, 262 U. S. 43, will show that if the averments in this complaint are averments of conclusions of law, the same is equally true of the averments in the complaint in the *Prendergast* case.

This court, however, said of the allegations in the complaint in the *Prendergast* case, that the complaint "aptly stated the ultimate facts upon which the company asked relief omitting any mere statements of evidence."

Conclusion.

It is pointed out in our brief opposing the motion to dismiss the appeal from the order of the statutory court denying an interlocutory injunction, that if that particular appeal is dismissed the question of whether or not the statutory court should have considered our application for an interlocutory injunction on the merits should be considered on this appeal.

In any event, all we seek by these appeals is an opportunity to have the case considered on its merits. So far we have been denied that opportunity, and the denial has been based upon the ground that the legislative process of determining the value of our property is not complete, and that there is a possibility that the state courts of Washington, if applied to, will stay the enforcement of the rate order which deprives us of our property. But the answer to these assertions of fact and possibility is clear and complete. It is not necessary for a utility which is daily suffering confiscation to await the termination of the legislative process of rate making, much less that of the process of determining value, before it may invoke the aid and

power of a United States court. Again, the legislative process was at an end on March 31, 1923, because (a) the statute which attempts to impose a legislative duty upon the state courts of Washington is absolutely void, and (b) the rate order of March 31, 1923, which deprives us of our property has never been reviewed and cannot now be reviewed in the state courts. Moreover, even if that order could now be reviewed its enforcement could not, by virtue of positive and express provisions of the statutes of the State of Washington, be stayed by the courts of that state.

We, therefore, respectfully submit that the order of the statutory court entered on April 30, 1923, and the decree of dismissal signed on January 5, 1924, by the District Judge are erroneous and should be reversed.

Respectfully submitted,

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Appendix.

SECTION 10428 OF REMINGTON'S COMPILED STATUTES, 1922, OF WASHINGTON.

Any complainant or any public service company affected by any order of the commission, and deeming it to be contrary to law, may, within thirty days after the service of the order upon him, or it, apply to the superior court of the county in which such proceeding was instituted for a writ of review, for the purpose of having its reasonableness and lawfulness inquired into and determined. Such writ shall be made returnable not later than thirty days from and after the date of the issuance thereof, unless upon notice to all parties affected a further time be fixed by the court, and shall direct the commission to certify its record in the case to the court. On such return day the cause shall be heard by the court, unless for good cause shown the same be continued. Said cause shall be heard by the court without the intervention of a jury on the evidence and exhibits introduced before the commission and certified to by it. Upon such hearing the superior court shall enter judgment either affirming or setting aside the order of the commission under

review. In case said order is reversed by reason of the commission failing to receive testimony properly proffered, the court shall remand the cause to the commission, with instructions to receive the testimony so proffered and rejected, and enter a new order based upon the evidence theretofore taken, and such as it is directed to receive. The court may, in its discretion, remand any cause which is reversed by it to the commission for further action.

SECTION 10441 OF REMINGTON'S COMPILED STATUTES, 1922, OF WASHINGTON.

Valuation of Property—Procedure.

The commission shall ascertain, as early as practicable, the cost of construction and equipment, the amount expended in permanent improvements, and proportionate amount of such permanent improvements charged in construction and to operating expenses respectively, the present as compared with the original cost of construction, and the cost of reproducing in its present condition the property of every public service company.

It shall also ascertain the amount and present market value of the capital stock and funded indebtedness of every public service company.

It shall also ascertain in the case of companies engaged in interstate business, the relative value of the use to which such property in this state is actually put in the conduct of interstate business and state business respectively.

It shall also ascertain the total market value of the property of each public service company operating in this state used for the public convenience within the state.

It shall also ascertain the time intervening between the expenditure of money in the cost of construction and time when returns in the shape of dividends were first received by each of these companies.

It shall also ascertain the probable earning capacity of each public service company under the rates now charged by such companies and the sum required to meet fixed charges and operating expenses, and in case of a company doing interstate business it shall also ascertain the probable earning capacity of such company upon intrastate business, and the sum required to meet fixed charges and operating

expenses on intrastate business, and the relative proportion of intrastate and interstate business, the relative proportion of the operating expenses connected therewith, the relative proportion of the revenue which should be derived therefrom.

It shall also ascertain the density of traffic and of population tributary to every public service company, and the conditions which will tend to show whether such traffic and population is likely to continue, increase or diminish.

It shall also ascertain the existence of grades, curvatures and other physical conditions affecting the movement of traffic and business of common carriers.

It shall also ascertain whether the expenditures already made by any public service company in procuring its property were such as were justified by the then existing conditions, and such as might reasonably be expected in the immediate future and whether the money expended by such company has been reasonable for the present needs of the company and for such needs as may reasonably be expected in the immediate future.

The commission is hereby authorized to cause a hearing or hearings to be held at such time or times

and place or places as the commission may designate for the purpose of ascertaining the matters and things provided for in this section.

The commission shall, before any hearing is had, notify the company concerned of the time and place of such hearing, by giving at least thirty days' written notice thereof, specifying that at the time and place designated a hearing will be held for the purpose of ascertaining the value of such company's property within the state, which shall be a sufficient complaint to authorize the commission to inquire into the matters designated in this section.

All companies affected shall be entitled to be heard and introduce evidence at such hearing. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission.

The commission shall make and render findings of fact in writing covering all matters in this section mentioned concerning which it is directed to inquire into, and shall make findings upon all matters concerning which evidence may have been introduced before it shall tend to show the value of the property used by such company for the public convenience.

Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the State of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the State of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.

The findings of the commission so filed, or as the same may be corrected by the courts, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing, excepting with respect to matters of assessment and taxation, in which the state or any officer, department or institution thereof, or any county, municipality, or other body politic and the public service company affected is interested, whether arising under the provisions of this act

or otherwise, and such findings when so introduced shall be conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing, except as a basis for taxation, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

The commission shall hereafter, from time to time, cause further hearings to be had for the purpose of ascertaining the betterments, improvements, additions, and extensions made by any public service company to its property subsequent to the date of any prior hearing, and shall examine into all traffic movement and every matter and thing that would change, modify or affect any finding of fact previously made, and shall at such time make findings of fact supplemental to those theretofore made, showing the amount expended in betterments, improvements, extensions and additions since such prior findings and the cost of reproducing the same, the value of the property used by such company at the time of such subsequent hearing, the relative value of the use to which such property is put in the performance of intrastate and interstate business, respectively, and the value of the property of such company in the state used for the public convenience

of intrastate business. Such hearing shall be had upon the same notice, the examination conducted in the same manner, and the findings so made shall have the same force and effect as is provided herein for such original notice, hearing and findings: Provided, that such findings made at such supplemental hearing shall be considered in connection with and as a part of the original findings except in so far as such supplemental findings shall change or modify the findings made at the original hearing.